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After 250 Years, Zenger's Editorial Victory Lives On

By Floyd Abrams

Yesterday marked the 250th anniversary of the trial of John Peter Zenger. So irresistible is the story-book quality of the trial that it is tempting to overlook its continuing meaning.

The dramatic impact of the case tends to sweep all before it: The brave colonial editor and publisher denouncing the tyrannical governor for his misconduct in office; the public burning of copies of Zenger's newspaper, *The New York Weekly Journal*, by the colonial government, followed by charges accusing him of seditious libel; the elderly Philadelphia lawyer Andrew Hamilton voyaging to New York to try to persuade a jury to decide in Zenger's favor; the jury, defying the judge's instructions that truth was no defense in such a case, ruling in Zenger's favor, to the cheers of the packed courtroom. And then, when Hamilton departed from New York harbor the next day, the huge cannon salute in his honor by ships there. It is no wonder that so glorious a tale has been told and retold in elementary school classrooms throughout the country's history.

The story could use some special emphasis today. We all know, for example, that journalists who refuse to disclose their confidential sources have enjoyed considerable success in the courts. Yet there are many who believe that this is a modern phenomenon, that only in recent years have journalists even claimed the right to shield their sources. But more than 50 years before the First Amendment was drafted, the Crown demanded that Zenger disclose his sources. And from his jail cell, Zenger gave the same negative response that journalists routinely give today.

Or consider the crime of which Zenger was accused — seditious libel. Although the very notion of a libel against the state has long been viewed as anathema to First Amendment principles, as recently as last year the Central Intelligence Agency tried its hand at an updated form of punishment. Angered by an ABC television broadcast that aired charges

that the C.I.A. might be involved in an assassination plot, the Agency sought to persuade the Federal Communications Commission to strip ABC of its broadcast licenses. Although the F.C.C. rejected the agency's efforts, it nonetheless left open the possibility that in other circumstances the C.I.A. or other aggrieved governmental agencies might yet prevail in punishing critics in the broadcast media.

Zenger would have recognized the C.I.A. threat. One of his most stinging — and debatable — charges against New York's colonial Governor, William Cosby, was that Cosby had failed to prepare sufficient military defenses for the New York Colony. Beyond that, Zenger strongly hinted that Cosby had knowingly permitted the French to spy on the colony's defense fortifications.

"Is it prudent in an English governor," asked Zenger, "to suffer a Frenchman to view our fortifications, sound our harbors?" "Might not the governor," Zenger inquired further "have known" that the French "had sounded out and taken up landmarks from without Sandy Hook up to New York?" "Is there not great probability that he did know it?"

Such caustic and biting criticism is always offensive to those in power. And while the Director of Central Intelligence, William J. Casey, made no effort to jail any of his critics, his misguided willingness to use the power of the state to punish ABC was ominously reminiscent of Cosby.

Today, even Cosby would probably understand that a seditious libel prosecution against Zenger would fail. But he would still have recourse to another troubling legal weapon: A private libel action brought in his own name rather than that of the state. This was the weapon used by Gen. William C. Westmoreland against CBS, and by the former Israeli Defense Minister, Ariel Sharon, against

Time magazine. Why not Cosby?

To the extent that Zenger's editorials were viewed as stating facts and not just voicing opinions, current law would allow a Cosby suit to proceed. Cosby's burden, however, would be considerable. Under the law established in *The New York Times Company v. Sullivan* ruling in 1964, he could prevail only if he proved by clear and convincing evidence that Zenger's statements about him were false and that they had been made with actual malice — that is, with knowledge of their falsity, or with serious doubts about their truth.

But those principles of law themselves are now under sustained attack. Juries have frequently failed to understand them; lower court judges have often sought ways to avoid them; at least two current Supreme Court Justices have expressed public disagreement with them.

A Zenger of today would be free of the risk of a seditious libel prosecution. But given the changing mood of the courts, he might have to think long and hard about criticizing a Cosby of today in the same uninhibited fashion he did 250 years ago. That should be a source of concern to all. □

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